termand, could not be terminated by the act of the defendants alone. The countermand, however, operated as a breach of the contract—an "anticipatory breach," not a rescission of it—and plaintiff had an immediate right of action. The action, however, should be to recover damages for the breach of the contract and not to recover the price as for goods sold and delivered. The measure of damages would be, not the price agreed upon, but the difference between the contract price and the market value at the time and place of delivery. When defendants repudiated the contract, plaintiff not only had the right to act upon the theory of a present breach, but was under obligation not to unnecessarily enhance the damages by proceeding after the countermand to finish its undertaking. *Unexcelled Fire Works Co.* v. *Polites*, 130 Pa. 536, 18 Atl. 1058, 17 Am. St. Rep. 788, was chiefly relied upon, but *Davis* v. *Bronson*, 2 N. D. 300, 50 N. W. 836, 16 L. R. A. 655, 53 Am. St. Rep. 783; *Gibbons* v. *Bente*, 51 Minn. 499, 53 N. W. 766, 22 L. R. A. 80; *Clarke* v. *Marsiglia*, 1 Denio (N. Y.) 317, 43 Am. Dec. 670; *Danforth* v. *Walker*, 37 Vt. 239, 40 Vt. 257; *Moline Scale Co* v. *Beed*, 52 Iowa 307, 3 N. W. 96, 35 Am. Rep. 272; *Butler* v. *Butler*, 77 N. Y. 472, 33 Am. Rep. 648; *Hosmer* v. *Wilson*, 7 Mich. 294, 74 Am. Dec. 716; *Ault* v. *Dustin*, 100 Tenn. 366, 45 S. W. 981; and *Roehm* v. *Horst*, 178 U. S. 1, 20 Sup. Ct. Rep. 780, 44 L. ed. 953, were also cited as sustaining the conclusion.

SALE—PERFORMANCE BY SELLER—SECOND TENDER AFTER JUSTIFIABLE REJECTION.—Defendant ordered of plaintiff a cash register to be paid for partly in cash and partly in notes falling due at monthly intervals. Plaintiff delivered a machine to defendant and received the cash and notes. Three days afterwards defendant discovered that the machine delivered was not the kind agreed upon, and returned it to plaintiff with a letter stating the fact. Plaintiff replied saying that it was a mistake, and that the error would be corrected in a few days. Defendant replied saying that he would not now accept any machine, and asking to have the money returned and the notes cancelled. Plaintiff wrote in reply that no countermand of the order would be permitted, and afterward tendered a proper machine which defendant refused to receive. Plaintiff retained the cash payment and brought action upon the notes. On the trial, plaintiff contended that the first machine was delivered merely for temporary use, but defendant was not so advised and did not so understand it. *Held*, that plaintiff could not recover. *Hallwood Cash Register Co.* v. *Lufkin* (1901), 179 Mass. 143, 60 N. E. Rep. 473.

While there may be cases in which a seller who has by mistake delivered a wrong article may, within the time originally fixed, correct the mistake by a delivery of the proper article, [See *Borrowman* v. *Free*, 48 L. J. Q. B. (N. S.) 65; *Tetley* v. *Shand*, 25 L. T. (N. S.) 658, 20 W. R. 206], this was not such a case. A reasonable time for the delivery had expired when the first machine was delivered, and a buyer is under no obligation to permit the seller to make repeated attempts to perform his contract. MECHEM ON SALES, § 1403; *McCormick Harvester Co.* v. *Russell*, 86 Iowa 556, 53 N. W. Rep. 310.

SALE—TRANSFERS OF DRAFT WITH BILL OF LADING ATTACHED—RIGHTS OF BUYER AGAINST TRANSFEREE.—A bank cashed a draft with bill of lading attached, drawn by the consignor on the consignee. The latter paid the draft, but on inspection found the goods were not of the quality contracted for. In an action by the consignee against the bank, *Held*, that he could recover the money paid on the draft. *Searles* v. *Smith Grain Co.* (1902), — Miss. — , 32 S. Rep. 287.

This case follows *Miller* v. *Bank*, 76 Miss. 84; *Landa* v. *Lattin*, 19 Tex. Civ. App. 246, 46 S. W. Rep. 48; *Finch* v. *Gregg*, 126 N. C. 176, 49 L. R. A.

679. The weight of authority, however, is to the contrary. See 1 MICH. LAW REV. 65; MECHEM ON SALES, § 1816; also note 49 L. R. A. 679.

STATUTE OF FRAUDS—DELIVERY TO SUSTAIN SALES AGAINST CREDITORS.—R. was a sawmill operator. J. advanced money on a written executory contract with R. to manufacture lumber from logs to be cut from land of R. and such other logs as R. might buy with money advanced by J. Logs and lumber were branded on R.'s millsite with mark of J. R. became bankrupt with the marked logs and lumber on his millsite. The creditors of R. and J. claimed the lumber. There was a statute making sales presumptively fraudulent as to creditors unless there was "actual and continued change of possession" of the thing sold. *Held*, that J. could recover the lumber and the logs. *Stelling* v. *G. W. Jones Lumber Co.* (1902), — C. C. A. - -, 116 Fed. Rep. 261.

Though the lumber was to be graded and measured at the time of shipment and then credited to R. for so much per thousand, the court held there was sufficent delivery to the purchaser to satisfy the statute, and that delivery need not be as complete as under the statute of frauds.

The supreme court of Georgia in *Brunswick Grocery Co.* v. *Lamar*, (1902) 42 S. E. Rep. 366, where the case turned upon the insufficiency of delivery under the statute of frauds, said: "There is no doubt that the delivery in whatever form it be made is such a one as will place the goods entirely beyond the control of the vendor and completely within the control of the vendee. There is no actual acceptance to satisfy the act so long as the buyer continues to have the right to object to the quantum or quality of the goods." In the former case J. had a right to object to the quantum and certainly to the quality as both measurement and grading had yet to be made.

STATUTE OF FRAUDS—FRAUDULENT CONVEYANCE—DISCHARGE OF A VALID LIEN BY VENDEE.—Land was conveyed without consideration to defraud creditors. The vendee *intended to aid* in the fraud. At the time of conveyance a mortgage constituted a valid lien upon the land, which the vendee paid. Creditors of the vendor brought an equitable action to recover the land free from any lien. *Held*, that the fraudulent vendee had a lien on the land for the mortgage paid by him. *Ackerman* v. *Merle* (1902,) — Colo. —, 69 Pac. Rep. 983.

This doctrine is sustained in *Garner* v. *Philips*, 35 Ia. 597, and *Costello* v. *The Prospect Brewing Co.*, 52 N. J. Eq. 557. But where a conveyance at a sale under a deed of trust was set aside as fraudulent as to creditors, it was held that the fraudulent grantee was not entitled to reimbursement for the amount he paid to redeem from the trust deed, though it was a valid incumbrance on the debtor's property. *McLean* v. *Latchford*, 60 Miss. 169.

In constructive fraud, the vendee has a lien for purchase money, but not in active fraud. Though a guilty participant, the grantee, on accounting for rents and profits, is entitled to allowance for taxes paid by him and for *necessary* repairs. *Loos* v. *Wilkinson*, 113 N. Y. 485, and many authorities cited; 4 L. R. A. 353. Contra *Strike's Case* 1 Blands Ch. R. (Md.) 57.

Where grantee is a participant in the fraud, the deed is void *ab initio* and is as if there had been no conveyance. *Thompson* v. *Bickford*, 19 Minn. 17. Improvements must generally be compensated for in constructive fraud, but not for improvements made after actual notice by superior claimant: or for premiums on insurance paid save so much as has been adopted and has inured to the benefit of judgment creditors. But taxes paid after bill filed by superior claimant must be reimbursed. *Gordon* v. *Tweedy*, 74 Ala. 232. If there is a mere suspicion of fraud on the part of the vendee, he has a lien for the sum paid. *U. S.* v. *Griswold*, 8 Fed. R. 496.